

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TROY GHRAMM

Claimant

VS.

EMPORIA CONSTRUCTION & REMODELING

Respondent

AND

ALLIED MUTUAL INSURANCE COMPANY

Insurance Carrier

Docket No. 199,776

ORDER

Respondent and insurance carrier appeal from an Order for Compensation dated August 24, 1995, wherein Administrative Law Judge Floyd V. Palmer granted claimant temporary total disability compensation benefits for three weeks at \$277.79 per week, medical treatment and payment of certain authorized and unauthorized medical expenses.

ISSUES

The issues as raised by respondent and insurance carrier in their Application for Review By Workers Compensation Appeals Board are stated as follows:

- "1. Respondent/Insurance Carrier requests review of the preliminary hearing order of the Honorable Floyd V. Palmer, Administrative Law Judge, entered August 24, 1995.
2. Specific issues presented and jurisdictional basis for review by respondent/insurance carrier:
 - a. The Administrative Law Judge in his order of August 24, 1995, made a finding that the claimant carried his burden of proof with regard to his entitlement of temporary total disability benefits for the three-week period in question and therefore exceeded his jurisdiction in granting temporary total disability benefits despite the application of certain defenses offered by the respondent/insurance carrier.
 - b. Any and all other issues raised at the preliminary hearing that can be properly raised before the Board."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for purpose of preliminary hearing, the Appeals Board finds as follows:

The Appeals Board must first determine whether it has jurisdiction to review this appeal from a preliminary hearing order. The Order for Compensation dated August 24, 1995, from which respondent appeals, deals solely with the issues of temporary total

disability compensation and medical treatment. K.S.A. 44-551(b)(2)(A), as amended by S.B. 59 (1995), states in pertinent part:

"If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing."

K.S.A. 44-534a(a)(2) clearly grants authority to the Administrative Law Judge to make a preliminary award of temporary total disability compensation. That statute further makes provision for the jurisdiction of the Appeals Board to review preliminary hearing orders:

"A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board."

Respondent contends that the claimant failed to cooperate with the recommended medical treatment by failing to attend his scheduled appointments with Dr. Huston. Respondent terminated claimant's temporary total disability compensation due to claimant's refusal to attend scheduled appointments with the authorized treating physician during the period between June 12, 1995 and June 28, 1995. It is respondent's position that claimant must be disqualified from receiving temporary total disability benefits. In support of its position, respondent cites K.S.A. 44-518 and K.A.R. 51-9-5 which provides:

"An unreasonable refusal of the employee to submit to medical or surgical treatment, where the danger to life would be small and the probabilities of a permanent cure great, will justify denial or termination of compensation beyond the period of time the injured worker would have been disabled had he or she submitted to an operation but only after a hearing as to the reasonableness of such refusal.

"The penalty provided for the refusal to submit to an examination will be rigidly enforced. There shall be the utmost co-operation between the parties throughout to ascertain the true facts."

Respondent contends that an allegation that claimant unreasonably refused to submit to medical treatment constitutes a certain defense under K.S.A. 44-534a(a)(2) such that the preliminary order entered by Administrative Law Judge is subject to review by the Appeals Board.

The question of the Appeals Board's jurisdiction to review this Order turns upon what is meant by "certain defenses." Unfortunately, the statute provides little guidance. The Appeals Board does not find that there exists a category of defenses to workers compensation claims known as "certain defenses." Rather, the phrase "certain defenses" is analogous to *some* defenses as opposed to *any* defense or *all* defenses. The word "certain" as used in K.S.A. 44-534a is intended to limit the type and character of defenses which can be said to give rise to Appeals Board jurisdiction. For insight into the certain type of defenses contemplated by the statute, we must look to the other issues specified in K.S.A. 44-534a which, if disputed, are considered jurisdictional. They include: (1) whether the employee suffered an accidental injury; (2) whether the injury arose out of and in the course of the employee's employment; and (3) whether notice is given or claim timely made. What these jurisdictional issues have in common is that they all go to the compensability of the claim. In other words, for a workers compensation claim to be compensable each and every one of the issues listed, if disputed, must be proven by a claimant before he or she can recover any benefits under the Workers Compensation Act. The Appeals Board has previously held, and hereby reaffirms the proposition that the

certain kind of defenses contemplated by K.S.A. 44-534a(a)(2) are defenses which go to the compensability of the claim. Examples of these type of defenses would be an allegation of willful failure to use a guard or the intoxication defense.

The defense raised by the respondent herein, if successful, would "justify denial or termination of compensation beyond the period of time the injured worker would have been disabled had he or she submitted to an operation [or treatment]." K.A.R. 51-9-5. Thus, the defense of an unreasonable refusal by an employee to submit to medical or surgical treatment, if successful, does not result in a finding that the claim is not compensable but rather can result in a cessation of benefits. Even with such a finding a claimant may still be entitled to benefits previously ordered or that predate the applicability of the defense. Nor would a respondent be entitled, for example, to reimbursement from the Workers Compensation Fund for medical or temporary total disability benefits previously provided under K.S.A. 44-534a(b) under circumstances where benefits are cut off pursuant to K.A.R. 51-9-5. Furthermore, a finding pursuant to K.A.R. 51-9-5 that an employee has unreasonably refused to submit to medical treatment such that compensation should be terminated is an interlocutory order which can be altered or rescinded based upon a change of circumstances or otherwise upon a rehearing of the matter. As stated previously, such a finding does not go the ultimate question of the compensability of the claim, but instead to the issue of claimant's entitlement to ongoing or future benefits. These examples all support a finding that, unlike the defense's alleging intoxication or a willful failure to use a guard, the provisions of K.A.R. 51-9-5 do not constitute a defense which should be considered jurisdictional and subject to review by the Appeals Board on an appeal from a preliminary order.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the appeal of respondent and its insurance carrier should be, and is hereby, dismissed and the Order of Administrative Law Judge Floyd V. Palmer dated August 24, 1995 remains in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of January 1996.

BOARD MEMBER _____

BOARD MEMBER _____

BOARD MEMBER _____

- c: Roger Fincher, Topeka, KS
- Matthew S. Crowley, Topeka, KS
- Floyd V. Palmer, Administrative Law Judge
- Philip S. Harness, Director